Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12571/2018

THE IMMIGRATION ACTS

Determined at Field House	**Determination Promulgated**
On 4th March 2019	**On 14th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

OB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M Malhotra, Counsel
For the Respondent: Miss J Isherwood, Senior Presenting Officer

DECISION BY CONSENT AND DIRECTIONS

1. Pursuant to Rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and by the consent of the parties the following order is made:

   (i) Upon the parties' agreement that the decision of the First-tier Tribunal promulgated on 4th January 2019 discloses a material error of law, it is hereby ordered by consent as follows.

   (ii) The First-tier Tribunal Judge made errors of law in relation to the complaints made in the Grounds of Appeal specifically in relation to the Appellant's

request for an adjournment or bringing this matter to the judge's attention prior to promulgation of the decision on 4th January 2019.

(iii) The error is quantified and agreed as follows:

(a) As noted by Judge Blundell in granting permission to appeal, the Appellant stated he was unable to attend his hearing on 2nd January 2019 at IAC Newport owing to illness and he applied for an adjournment through his solicitors on that same day by way of an e-mail to the customer service address albeit at 12:20pm in the afternoon. That e-mail attached to it a fax cover sheet. I do not understand why a fax was not sent to IAC Newport instead of an email, however, the email that was sent attached (i) a 'notice of acting' from MTG Solicitors, and (ii) a statement of fitness for work advising that the Appellant was not fit for work between 31st December 2018 and 7th January 2019 and (iii) a prescription for the Appellant dated 31st December 2018 prescribing some Triptan tablets for a migraine attack.

(b) The judge's consideration of these matters may be seen at §§11 to 12 of the decision. It appears that at the date of the hearing on 2nd January 2019 the Tribunal had not heard from the Appellant and there was no communication from him or an application for an adjournment and leaves me with great sympathy for the the First-tier Tribunal. The First-tier Tribunal Judge rightly made a check with the representatives on file (as far as he was aware of who the current representatives were) to discover whether they had applied for a further adjournment or not, and noted that the time and venue for the hearing had been sent out by first-class post and that the Appellant had replied that he would attend the hearing on 2nd January 2019.

(c) It thus appears that the judge was unaware of the email of 12:20pm of 2nd January 2019 and its attachments at least on the date of hearing and possibly prior to the decision being drafted. This appears to be because the e-mail that was sent to the Tribunal's customer services address at 12:20pm on 2nd January 2019 was not forwarded to IAC Newport until 11:52am on 4th January 2019.

(d) In granting permission to appeal Judge Blundell noted, that it was a "most unsatisfactory state of affairs", which could have been avoided if the Appellant's newly instructed solicitors had attended the hearing rather than assuming as they did in their facts of 2nd January 2019 that a revised hearing date would simply be provided. Judge Blundell demanded an explanation for the course of action taken by the newly instructed solicitors and directed that it should be provided to the Upper Tribunal.

(e) By way of a letter of 1st March 2019, written anonymously on behalf of MTG Solicitors, it is stated that the non-attendance occurred for two reasons:

> "1. Junior Counsel could not be instructed so late in the day to make an adjournment request and
>
> 2. The funds held on account were for the substantive hearing which the Appellant had put together with great difficulty with the assistance of his family and therefore he could not afford to waste further costs for Counsel to attend for the adjournment request. This is especially as fees are considerably higher for Counsel given Newport FTT is not the Appellant's local court. In light of this, the Appellant instructed the firm to write to the FTT in the above terms. The Appellant is only 19 years old and unfortunately not in receipt of Legal Aid therefore it is important for the funds put together to be used at the substantive hearing. Sadly they have now been used in the upcoming UT appearance due to the judge at the FTT giving no consideration of the request made by us on 2nd January 2019."

2. Notwithstanding the statement that attendance on the day of the hearing was not possible due to the Appellant's limited funds, further conflicting remarks were made by the Appellant in e-mail sent by him to the Tribunal's customer service address on 2nd January 2019 at 10:16pm at night (that being the same day his hearing had taken place). This e-mail also sent to customer services was received at IAC Newport, the following morning, on 3rd January 2019 at 11:22am. The Appellant confirmed that he had instructed his solicitors on 24th December 2018 and stated that he had been advised not to attend court when he spoke with his solicitors on 31st December 2018. The Appellant complains also in his e-mail of lapses by his solicitors and being let down and essentially explaining his reasons for not attending as falling at the solicitor's door, and not his.

3. On behalf of the Secretary of State, I was asked to note certain peculiar features, however, happily, it is not for me to determine (a) the veracity of when the Appellant's solicitors were instructed, (b) whether or not they could or should have come on record earlier, (c) why they did not phone or fax the First-tier Tribunal on the date of hearing to convey their adjournment application or (d) confirm its safe receipt given it was not sent in time for the 10am start of the Tribunal's list, nor (e) whether the Appellant was told not to attend without an adjournment being secured, nor (f) whether there was any truth to the Appellant's complaints against his own solicitors.

4. I share Judge Blundell's view that this is a most unsatisfactory state of affairs however whilst I must note the peculiarities of this appeal, none of the above is ultimately germane to the error of law at stake.

5. The short point that I take from all of this is that the first communication to arrive at the Tribunal was the e-mail sent by the Appellant on 2nd January 2019 at 10:16pm which arrived on 3rd January 2019 at 11:22am. This document according to a manuscript note on its face was put before Judge Woolley on 4th January 2019 however Judge Woolley directed that the judgment already being made would continue with promulgation in the normal course. It is that action which the parties

agree was a material error of law as, at that point, as noted by Judge Blundell, the First-tier Tribunal was still seized of the matter: see *E and R v Secretary of State for Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [27] which confirms *inter alia* that "*…up until the date of promulgation, the IAT would have been at liberty to admit further evidence (whether or not it was under any duty to do so)…In accordance with ordinary principles, the IAT remained seized of the matter until the decision was formally communicated to the parties*".

6. It was therefore an error for the judge to not consider the materials submitted by the Appellant regarding his non-attendance. I do not know whether the email (and its attachments) from the solicitors ever made its way before the judge; however, after receiving the Appellant's email, the judge ought to have either recalled the parties or acted in some way upon the communication rather than proceed with the promulgation of the decision of 4th January 2019 given that the Appellant's application to adjourn was brought to the First-tier Tribunal's attention before promulgation when it was still seised of the matter.

7. As a consequence of the above agreed errors, the decision is set aside in its entirety and is remitted to be heard by a differently constituted bench.

8. The Appellant's appeal to the Upper Tribunal is therefore allowed.

9. The decision of the First-tier Tribunal is set aside for legal error by consent.

Directions

10. I make the following directions for the continuation of this appeal that shall shortly follow before the First-tier Tribunal:

    1. The appeal is to be remitted to IAC Hatton Cross (not IAC Newport, given that the Appellant suffers from funding difficulties and given the unnecessary distance that he would have to travel to attend his hearing).

    2. A Dari interpreter is required.

    3. At present the Appellant and two witnesses may be called to give evidence.

    4. The time estimate given for this appeal is three hours.

    5. No special directions have been requested and none shall therefore be given however I note that the Appellant is yet to serve a bundle upon the Tribunal in any form and I thus direct that any bundle shall be served no later than 7 days before the remitted hearing.

    6. The First-tier Tribunal issued an anonymity direction which is hereby maintained.

Anonymity

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 14 March 2019

Deputy Upper Tribunal Judge Saini